

Message

From: Elkins, Arthur [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8E6CFEF587834F388791A500A803E7B2-ELKINS, ARTHUR]
Sent: 6/26/2014 11:16:17 PM
To: McCarthy, Gina [Ex: 6 Personal Privacy (P)] McCarthy.Gina@epa.gov
CC: Fritz, Matthew [Fritz.Matthew@epa.gov]
Subject: OIG Concerns (as requested)

Gina,

As you invited me to do in your June 21, 2014 email to me, I am writing to express my deep concerns with your June 19, 2014 memorandum to me and the Acting Associate Administrator, Office of Homeland Security, subject "Working Effectively and Cooperatively" and in particular the attached "Environmental Protection Agency (EPA) Procedures for the EPA Office of Homeland Security (OHS) and the EPA Office of Inspector General (OIG) with respect to the handling of matters related to National Security and Intelligence" (hereinafter "Procedures"). To date, despite numerous communications and meetings, this matter is still unresolved. OHS continues to deny OIG access to information necessary for OIG to fulfill its statutory responsibilities.

As you may be aware, the OIG's investigative role in relation to OHS and in particular to conducting employee misconduct investigations involving national security issues has been in dispute between our respective offices for a number of years, even predating my appointment as the IG in 2010. While I appreciate that OHS has an important programmatic role to help ensure that EPA fulfills its environmental protection mission, the OIG has a unique statutorily mandated role to investigate employee or contractor misconduct without limitation, even if the misconduct is related to a breach of national security laws. The Procedures, however, are not consistent with my statutory responsibilities under the IG Act, and I have no authority to agree to execute my duties in any way that is contrary to these statutory responsibilities.

I have three fundamental concerns about the Procedures.

First, they fail to acknowledge the authority of the OIG to investigate -- without impediment or delay -- allegations of employee or contractor misconduct related to national security.

Second, they filter OIG access to information through OHS and allows OHS to decide what information goes to the OIG, and when (if ever). The IG Act clearly and explicitly affords IGs unfettered and unfiltered access to all "records, reports, audits, reviews, documents, papers, recommendations, or other material available to" the agency.^[1] The Procedures state that OHS will provide information to the OIG "to the maximum extent allowed by law" and "may seek advice and counsel from the Office of General Counsel for the purpose of determining any applicable statutory or other limitations on the sharing or dissemination" of information with the OIG. This equivocation, I fear, could result in continued attempts by OHS to refuse, restrict, or delay prompt OIG access to information and thus thwart employee misconduct investigations. As evident from the obstacles and delays caused by OHS long before OIG was alerted to and commenced the Beale investigation, this is unacceptable.

Third, the Procedures fail to acknowledge that it is the OIG's role -- as a law enforcement entity -- to work directly with the FBI on investigations involving EPA employee misconduct. The OIG must be present whenever the FBI conducts an interview of an EPA employee. The Procedures establish a framework, however, that channels all information and contacts with the FBI through OHS.^[2] Any

^[1] 5 U.S.C. app. 3 § 6(a)(1).

^[2] While your memo indicates that the MOU between OHS and the FBI "will be reassessed and possibly revised to reflect and support the attached procedures," my position is that it must be revised to be in conformity

such arrangement where OHS is a de facto gate keeper between the OIG and the FBI is not acceptable. Moreover, because OHS does not have law enforcement powers, the Procedures should clearly state that OHS employees will not participate in law enforcement or investigative activity, to include interviewing, or participating in the interviewing of EPA employees/contractors.^[3]

On a closely related matter, after the May 7, 2014 hearing before the House Committee on Oversight and Government Reform, on May 8, 2014, my Assistant Inspector General for Investigations, Patrick Sullivan, requested that the Deputy Administrator provide specific information on threat cases and basic statistical information about past OHS investigative activities. To date, while there has been some dialogue with OHS on threat cases, we have not received any responsive information.^[4]

Refusing, restricting, or delaying an Inspector General's access to documents leads to incomplete, inaccurate, or significantly delayed findings or recommendations, which in turn may prevent the agency from correcting serious problems in a timely manner and deprive Congress of timely information regarding the agency's performance. The agency's failure to produce the requested information may be considered an impediment to OIG work. Agency actions that limit, condition, or delay access thus have profoundly negative consequences for our work: they make us less effective, cause serious delays in our work, encourage others to take similar actions in the future, and erode the morale of the dedicated professionals that make up our staffs.

While I urgently wish to resolve all of these issues, I cannot waive statutorily mandated obligations and authorities as these Procedures would compel me to do.

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^[1] 5 U.S.C. app. 3 § 6(a)(1).

² While your memo indicates that the MOU between OHS and the FBI "will be reassessed and possibly revised to reflect and support the attached procedures," my position is that it must be revised to be in conformity with the IG Act, to recognize the IG Act's mandate that it is the IG who has the authority to "conduct, supervise and coordinate ... investigations" relating to the EPA. See 5 U.S.C. app. 3 § 4(a)(1).

³ Because OHS lacks law enforcement authority, any such investigative activity by OHS personnel potentially jeopardizes a case from successful prosecution and exposes the agency to potential liability.

⁴ And none of the information requested implicate FBI records.

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